

## CCRB INVESTIGATIVE RECOMMENDATION

|   |   |                           |   |                                    |                                 |
|---|---|---------------------------|---|------------------------------------|---------------------------------|
| Investigator:<br>Kelly Guillon                    | Team:<br>Squad #17  | CCRB Case #:<br>202304127 | <input type="checkbox"/> Force                        | <input type="checkbox"/> Discourt. | <input type="checkbox"/> U.S.   |
|   |   |                           | <input checked="" type="checkbox"/> Abuse             | <input type="checkbox"/> O.L.      | <input type="checkbox"/> Injury |
| Incident Date(s)<br>Tuesday, 05/02/2023 9:56 PM   | Location of Incident:<br>East 166th Street and Sherman Avenue | 18 Mo. SOL<br>11/2/2024   | Precinct:<br>44                                       |                                    |                                 |
| Date/Time CV Reported<br>Tue, 05/02/2023 10:07 PM | CV Reported At:<br>IAB  | How CV Reported:<br>Phone | Date/Time Received at CCRB<br>Wed, 05/10/2023 2:51 PM |                                    |                                 |

| Complainant/Victim | Type | Home Address |
|--------------------|------|--------------|
|                    |      |              |

| Subject Officer(s)       | Shield | TaxID  | Command |
|--------------------------|--------|--------|---------|
| 1. PO Omar Aguilmartinez | 18025  | 963837 | 044 PCT |

| Witness Officer(s)     | Shield No | Tax No | Cmd Name |
|------------------------|-----------|--------|----------|
| 1. PO Jack Lopez       | 25935     | 967170 | 044 PCT  |
| 2. PO Francisco Garcia | 02866     | 952762 | 044 PCT  |

| Officer(s)                | Allegation  | Investigator Recommendation |
|---------------------------|---|-----------------------------|
| A . PO Omar Aguilmartinez | Abuse: Police Officer Omar Aguilmartinez stopped<br>§ 87(2)(b)    |                             |
| B . PO Omar Aguilmartinez | Abuse: Police Officer Omar Aguilmartinez questioned<br>§ 87(2)(b) |                             |
| C . PO Omar Aguilmartinez | Abuse: Police Officer Omar Aguilmartinez frisked<br>§ 87(2)(b)    |                             |
| D . PO Omar Aguilmartinez | Abuse: Police Officer Omar Aguilmartinez searched<br>§ 87(2)(b)   |                             |
| § 87(2)(g), § 87(4-b)     |   |                             |
| § 87(2)(g), § 87(4-b)     |   |                             |

## Case Summary

On May 2, 2023, § 87(2)(b) filed this complaint with the Internal Affairs Bureau (IAB) via telephone. IAB referred the case to the CCRB, and it was received on May 10, 2023.

On May 2, 2023, at approximately 9:56 PM, § 87(2)(b) stood at the corner of East 166<sup>th</sup> Street and Sherman Avenue in the Bronx when he was stopped by Police Officer Omar Aguilmartinez from the 44<sup>th</sup> Precinct and asked, “Do you have something you’re not supposed to have on you, man?”

**(Allegation A: Abuse of Authority, § 87(2)(g) (Allegation B: Abuse of Authority, § 87(2)(g) Without waiting for § 87(2)(b) response, Police Officer Aguilmartinez frisked and placed his hand inside one of his pockets for approximately three seconds (Allegation C: Abuse of Authority, § 87(2)(g) (Allegation D: Abuse of Authority, § 87(2)(g) Police Officer Aguilmartinez then provided § 87(2)(b) with his business card and left the scene.**

§ 87(2)(g), § 87(4-b)

§ 87(2)(b) was not arrested or given a summons on the date of the incident.

Body-worn camera (BWC) footage from Police Officer Aguilmartinez, Police Officer Jack Lopez and Police Officer Francisco Garcia of the 44<sup>th</sup> Precinct were received (BR 01). These videos are summarized in IA #45 (BR 02).

## Findings and Recommendations

**Allegation (A) Abuse of Authority: Police Officer Omar Aguilmartinez stopped § 87(2)(b)**

**Allegation (B) Abuse of Authority: Police Officer Omar Aguilmartinez questioned § 87(2)(b)**

**Allegation (C) Abuse of Authority: Police Officer Omar Aguilmartinez frisked § 87(2)(b)**

**Allegation (D) Abuse of Authority: Police Officer Omar Aguilmartinez searched § 87(2)(b)**

In Police Officer Aguilmartinez’s BWC footage (BR 03), the first minute of which has no audio, Police Officer Aguilmartinez operates his police vehicle before stopping at the corner of 166<sup>th</sup> Street and Sherman Avenue in the Bronx. Officers stay within the vehicle for approximately 45 seconds before turning on their BWCs and exiting the vehicle all together. At runtime 01:00, Police Officer Aguilmartinez approaches a group of males including § 87(2)(b) standing in front of a convenience store. § 87(2)(b) is a black male wearing an unzipped orange winter coat and holding a black fanny pack in his right hand. § 87(2)(b) right coat pocket appears weighed down by an object within it. His right coat pocket hangs below his waist as his left coat pocket hangs above his waist. At runtime 01:16, § 87(2)(b) right coat pocket is clearly depicted, however, given the shape and puffiness of the winter coat, the footage does not capture a distinct outline of any bulge of that pocket. Police Officer Aguilmartinez stands in front of § 87(2)(b) as the officer tells him, “Do you have something you’re not supposed to have on you, man,” and § 87(2)(b) replies, “I don’t have anything, do you want to check my fanny pack?” While saying this, § 87(2)(b) lifts his black fanny pack as Police Officer Aguilmartinez tells § 87(2)(b) “No.” A civilian among the group then tells § 87(2)(b) “They don’t have to check,” and § 87(2)(b) replies, “They don’t have to check, I’m just telling them I don’t got nothing.” At runtime 01:31, Police Officer Aguilmartinez gestures his left hand towards § 87(2)(b) right coat pocket and says aloud,

"You mind if I check this pocket, this pocket is a little heavy." Prior to § 87(2)(b) verbal response, Police Officer Aguilmartinez's left hand squeezes the outside of the pocket. While squeezing the right sided coat pocket, approximately three of the officer's fingers enter the pocket. § 87(2)(b) then tells Police Officer Aguilmartinez, "go ahead," while attempting to place his own hand within his coat pocket; however, Police Officer Aguilmartinez places his left hand onto § 87(2)(b) right wrist and guides § 87(2)(b) hand outside of the coat pocket while saying, "Hold on." At no point does Police Officer Aguilmartinez explain to § 87(2)(b) that he can refuse consent. At runtime 01:37, Police Officer Aguilmartinez steps closer to § 87(2)(b) as he squeezes the right coat pocket. As the pocket goes below the video frame, rustling is heard, and the right side of the coat shifts rapidly back and forth. Police Officer Aguilmartinez's BWC footage does not capture what the officer is doing with his hands at this time. § 87(2)(b) then questions why the officer is touching him, and Police Officer Aguilmartinez responds, "I already told you why." § 87(2)(b) then replies, "Ok, but you can't just...." Police Officer Aguilmartinez then repeatedly tells § 87(2)(b) "I'm telling you why," as § 87(2)(b) comments that the officer's physical interaction was disrespectful and another civilian says aloud, "Yo, just let them." At runtime 01:49, Police Officer Aguilmartinez tells § 87(2)(b) "It looks like, it looks like you have a firearm." A civilian among the group then questions why they are being stopped and Police Officer Aguilmartinez tells the civilian that he is not being stopped and is free to go. Police Officer Aguilmartinez appears to make physical contact with § 87(2)(b) pocket for approximately 25 seconds. At runtime 02:25, Police Officer Aguilmartinez offers § 87(2)(b) his business card and § 87(2)(b) accepts the offer. § 87(2)(b) then questions the legality of Police Officer Aguilmartinez's actions and Police Officer Aguilmartinez tells § 87(2)(b) that the interaction was a "Terry stop" and leaves the scene once he gives § 87(2)(b) his business card. This footage captures the entire incident.

§ 87(2)(b) statement (BR 04) is generally consistent with the BWC footage collected during the investigation excluding the specific physical interaction between § 87(2)(b) and Police Officer Aguilmartinez. § 87(2)(b) alleged that the officer made physical contact with his left front pants pocket by placing his entire hand within the pocket without seeking consent. § 87(2)(b) described this physical interaction as Police Officer Aguilmartinez moving around the objects in his pockets as if he was looking for something "sharp." Police Officer Aguilmartinez's hand was inside of § 87(2)(b) pocket for approximately three seconds which § 87(2)(b) described as an "in-and-out" motion by the officer. Police Officer Aguilmartinez only made physical contact with his left front pants pocket and § 87(2)(b) did not remember if the officer frisked the pocket at any point during the incident.

Consent to Search Report # § 87(2)(b) (BR 05) was completed by Police Officer Aguilmartinez, for an incident that occurred at 9:55 PM on May 2, 2023, at East 166<sup>th</sup> Street and Sherman Avenue in the Bronx, where the officer obtained consent from a "black male." This document does not contain the civilian's name or date of birth, nor does it note the date and time of the report's completion; however, the endorsement history shows that the report was approved by Sergeant Christian Cayenne of the 44<sup>th</sup> Precinct on May 11, 2023, at 3:59 PM.

Police Officer Aguilmartinez stated (BR 06) that prior to interacting with § 87(2)(b) he was operating an unmarked patrol vehicle, patrolling a dangerous "high crime" area with frequent gun violence, when he observed § 87(2)(b) right coat pocket and saw its unevenness compared to the other pocket, due to its contents' apparent heaviness. Police Officer Aguilmartinez parked his vehicle at the corner but did not recall the distance between his vehicle and § 87(2)(b). From where the officer parked his vehicle, he was able to clearly see § 87(2)(b) right coat pocket. At this time, § 87(2)(b) stood on the sidewalk. The pocket had a discernible bulge, with the outline of the bulge forming a "J" shape. This outline of the bulge made Police Officer Aguilmartinez



believe that § 87(2)(b) had concealed a “revolver” within his coat pocket. The officer described the revolver as being placed “upside down,” with the barrel of the gun resting toward the zipper of the coat as it faced upward towards § 87(2)(b) chest and the handle of the gun rested horizontally on the base of the coat pocket. During Police Officer Aguilmartinez’s observation, § 87(2)(b) made eye contact with the officer and then immediately averted his gaze and nervously pace back and forth. In combination with § 87(2)(b) “suspicious” gestures and the bulge, Police Officer Aguilmartinez had reasonable suspicion that § 87(2)(b) was concealing a firearm. Police Officer Aguilmartinez did not recall having a conversation with his partners prior to exiting his police vehicle and believed he was the officer who made the decision to exit the police vehicle. Police Officer Aguilmartinez observed § 87(2)(b) pocket within the patrol vehicle for approximately one minute. Upon exiting the vehicle, Police Officer Aguilmartinez asked § 87(2)(b) “Do you have anything you aren’t supposed to have?” due to his belief that § 87(2)(b) had a firearm in his coat pocket. § 87(2)(b) was not free to leave at this point. Police Officer Aguilmartinez stated once he stood in front of § 87(2)(b) the outline of the bulge became clearer and was still indicative of a firearm within the pocket. § 87(2)(b) told Police Officer Aguilmartinez that he did not have anything on him and questioned if the officer would like to check his fanny pack. Police Officer Aguilmartinez denied the request and instead asked § 87(2)(b) if he could “check” his coat pocket instead. At this time, Police Officer Aguilmartinez was asking § 87(2)(b) for consent to frisk the exterior of the coat pocket. Police Officer Aguilmartinez explained that he did not need § 87(2)(b) consent to frisk the outside of the coat pocket because he had a reasonable suspicion that there was a firearm within the pocket, but he chose to ask § 87(2)(b) for his consent because he did not want § 87(2)(b) to feel violated by the officer’s actions. Police Officer Aguilmartinez told § 87(2)(b) that he could decline if he wished to and § 87(2)(b) told the officer, “Go ahead.” Upon being given verbal consent, Police Officer Aguilmartinez frisked § 87(2)(b) coat pocket with both of his hands and determined that the objects within the pocket were a phone and a portable phone charger connected by a wire. Police Officer Aguilmartinez denied placing his hand within the coat pocket at any point during the incident. Upon being shown his own BWC footage of the incident, Police Officer Aguilmartinez explained that the footage did not clearly capture what he recalled seeing in regard to the shape of the bulge given the low video quality. Upon an initial review of the footage, Police Officer Aguilmartinez stated he made physical contact with § 87(2)(b) coat pocket prior to being given verbal consent for safety reasons because § 87(2)(b) was motioning towards his coat pocket, which he believed contained a gun. Police Officer Aguilmartinez took a protective action by placing his hand on § 87(2)(b) wrist and guiding his hand away from the pocket. Upon being shown the footage a second time, Police Officer Aguilmartinez acknowledged that he made physical contact with § 87(2)(b) pocket prior to § 87(2)(b) motioning to his pocket and believed he did this because he already had consent from § 87(2)(b) to frisk his pocket when he initially proffered consent to frisk his fanny pack. Police Officer Aguilmartinez believed because § 87(2)(b) proffered consent to frisk his fanny pack it gave the officer consent to also frisk his pocket. Police Officer Aguilmartinez denied placing his fingers within the coat pocket during his frisk and did not remember how long he frisked the pocket for.

Patrol Guide Procedure 212-11 (BR 07) states that founded suspicion of criminal activity arises when there is some present indication of criminality based on observable conduct and with founded suspicion an officer is permitted to ask the civilian pointed or accusatory questions. Reasonable suspicion exists when the information known to the member of the service would make an ordinarily prudent and cautious police officer believe that a crime has been committed. A stop is any encounter between a civilian and uniformed member of service in which a reasonable person would not feel free to disregard the officer and walk away. A stop may be conducted only when a police officer has an individualized reasonable suspicion that the person stopped has committed a felony or Penal Law misdemeanor. A “frisk” is classified as a careful and limited run of the hands

over the outside of a person's clothing to feel for deadly weapons or any instruments, article or substance readily capable of causing serious physical injury and of a sort not ordinarily carried in a public place and a search occurs when an officer places their hands inside a pocket or other interior portion of a person's clothing or personal property. During a stop an officer may request consent to search; however, the consent must be voluntarily given. If said person does not consent to a search, the search cannot be conducted unless a previous frisk reveals an object that the officer reasonably suspects is a weapon or dangerous instrument.

New York City Administrative Code 14-173 (BR 08) establishes that, when seeking consent to search a person, officers are to articulate, using plain and simple language delivered in a non-threatening manner, that the person who is the subject of the search is being asked to voluntarily, knowingly, and intelligently consent to such search, and explaining that such search will not be conducted if the person refuses to provide consent to such search. An officer must refrain from conducting such search where such consent has not been obtained. Officers are to secure the consent without threats or promises of any kind being made. This guidance does not apply when an officer reasonably expects that he or she or any other person is in danger of physical injury or that there is an imminent risk of damage to property, or to forestall the imminent escape of a suspect or the imminent potential destruction of evidence.

An officer may only ask pointed and accusatory questions of a civilian when the officer has founded suspicion of criminality and innocuous behavior alone will not generate a founded or reasonable suspicion that a crime is at hand. For a stop of an individual to be justified, an officer must have reasonable suspicion that the individual is committing, has committed, or is about to commit a crime. A frisk of an individual must be based on a reasonable suspicion that a particular person has committed, is committing or is about to commit a crime and that the officer is in danger by virtue that the individual is armed, and innocuous behavior alone is not adequate basis for reasonable suspicion. Unlike a waistband bulge, telltale of a weapon, a pocket bulge could be caused by any number of innocuous objects. "Police officers may not seize an individual, either physically or constructively, without some articulable justification." If the frisk reveals an object that is reasonably believed to be a weapon, the officer is permitted to enter clothing and remove it. (People v. DeBour, 40 N.Y.2d 210 (1976) (BR 10))

"Undefinable pocket bulges are not considered to be sufficient predicate for a frisk or search for a revolver, although defined bulges in the outline or configuration of a gun do warrant a frisk." (People v. Taveras, 155 A.D.2d 131 (1990) (BR 11))

In People v. Black, 972 N.Y.S.2d 145 (2013) (BR 09), officers in the Bronx heard gunshots in close proximity to their location and went to investigate the scene. Once arriving at the location where the gunshots were heard, they saw a group of civilians walking and questioned if they heard any gunfire. At this point the officers stated that the group seemed confused and surprised by the officers as they accelerated their walking speed and one of them began adjusting the right side of his jacket and his waistband as if the individual was grasping an object on the side of his jacket, with an observable bulge of a "heavy object of substantial size" at his waist. The group then ran as the officers chased after them. The court determined once the officers heard the gunfire, they had an objective creditable reason to question the group about it. However, there was no evidence that could link the defendants to the gunfire heard at this time. Though the officers testified that a member of the group had a heavy bulge, the officers were unable to provide a detailed description of the bulge such as its shape. The court determined that "without any nexus between the shots fired and the Defendant, the surprised look on the face of the Defendant and the two other individuals does not provide a connection sufficient to raise the level of intrusion. The two events are too attenuated, one from the other. Therefore, the Officer's inquiry does not begin with a founded

In Police Officer Aguilmartinez's account, he stated that he saw a "J-shape[d]" bulge outlined within § 87(2)(b) coat pocket indicative of an "upside down" "revolver," leading to his reasonable suspicion that § 87(2)(b) was armed and dangerous. Upon exiting the police vehicle, the shape of the bulge became clearer to the officer, which led him to question § 87(2)(b) and frisk the pocket. However, despite the BWC footage depicting a weighted bulge in § 87(2)(b) right coat pocket, the footage clearly depicts the pocket and does not capture a discernible outline given the shape and material of the winter coat. § 87(2)(g)

§ 87(2)(g)

[illegible]

### Civilian and Officer CCRB Histories

- § 87(2)(b)  
[REDACTED]  
[REDACTED]  
■ [REDACTED]  
[REDACTED]  
■ [REDACTED]  
[REDACTED]  
■ [REDACTED]  
[REDACTED]  
■ [REDACTED]  
[REDACTED]
- Police Officer Aguilar Martinez has been a member of service for six years and has been a subject in six other CCRB complaints and 11 other allegations, none of which were substantiated. § 87(2)(g) [REDACTED]  
[REDACTED]

### Mediation, Civil, and Criminal Histories

- § 87(2)(b) declined to mediate this complaint.
- As per the NYC Comptroller's Office, as of October 23, 2023, no Notice of Claim had been filed about this incident (**BR 15**).
- [§ 87(2)(b)] [§§ 86(1)(3)&(4)] [§ 87(2)(c)]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

## RPBP History

- This complaint did not contain any allegations of Racial Profiling/Bias-Based Policing.

Squad No.: 17

|               |                      |                                   |                                      |
|---------------|----------------------|-----------------------------------|--------------------------------------|
| Investigator: | <u>Kelly Guillon</u> | <u>Investigator Kelly Guillon</u> | <u>November 2<sup>nd</sup>, 2023</u> |
|               | Signature            | Print Title & Name                | Date                                 |

|               |                         |                             |                   |
|---------------|-------------------------|-----------------------------|-------------------|
| Squad Leader: | <u>Benjamin Shelton</u> | <u>AIM Benjamin Shelton</u> | <u>11/03/2023</u> |
|               | Signature               | Print Title & Name          | Date              |

|           |           |                    |         |
|-----------|-----------|--------------------|---------|
| Reviewer: | <u></u>   | <u></u>            | <u></u> |
|           | Signature | Print Title & Name | Date    |